Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

No. 90-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GRUMMAN AEROSPACE CORPORATION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GRUMMAN AEROSPACE CORPORATION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Aerospace Industries Association of America, Inc. ("AIA") is the national trade association representing the manufacturers of aerospace equipment. Virtually all of AIA's member-companies provide goods and services under contract to the United States Government. Many of those members, including petitioner Grumman Aerospace Corporation ("GAC"), derive a

substantial portion of their revenues from Government contracts. Taken together, AIA members have thousands of Government contracts worth billions of dollars. AIA member-companies have had in the past, and will have in the future, disputes with federal agencies that interpret the certification requirements of the Contract Disputes Act of 1978 ("CDA").

SUMMARY OF THE ARGUMENT

The opinion of the United States Court of Appeals for the Federal Circuit in this case elevates the "gap-filling" authority of Government agencies to an unprecedented level. Even if there had been a regulatory gap to fill in the simple statutory certification requirement of the CDA—and there was not—the Office of Federal Procurement Policy ("OFPP") only widened the gap by issuing a regulation whose ambiguities make predicting the validity of the certification for a given claim impossible. The confusion that arises from the face of the regulation has been deepened by the agency's strained application of it in this and other cases. The Federal Circuit only exacerbated this situation by advancing an overbroad view of agency authority and through its own idiosyncratic view of how the regulation, susceptible of many meanings, should be read.

The outcome is that contractors large and small, sophisticated and novice, are at a loss to determine how to comply with this straightforward legislative requirement in its regulatory incarnation. Some contractors may reasonably conclude that they are incapable of certifying their claims, or many of them, absent a reorganization of their business assignments. Short of this, other contractors must balance meeting

the convoluted personnel descriptions of the regulation against the actual functions of their employees in an effort to divine who may be capable of making a valid certification. Threats of corporate and personal liability, as well as considerable financial jeopardy, attend the risk of an erroneous guess.

The panel's singleminded deference to the OFPP is responsible for transforming a clear statutory provision into the present state of confusion, losing the plain meaning of the law in the process. Granting GAC's petition for a writ of certiorari is necessary to correct a distortion of legislative intent in the CDA, and a tilt toward administrative agency aggrandizement in general.

ARGUMENT

I. THE REGULATION EXCEEDS OFPP'S STATUTORY AUTHORITY

A. Implied Delegation

The CDA contains a simple requirement calling for "the contractor" to certify claims in excess of $50,000. 41 U.S.C. § 605(c)(1). If OFPP had not confused the matter by interpreting the meaning of "contractor" in a regulation, 48 C.F.R. § 33.207(c)(2), there is no reason to believe that contractors and Government contracting agencies would be unable to ascertain the meaning of that statutory term for purposes of the certification requirement. As the instant petition and Judge Plager's dissent point out, the "contractor," when it is a corporation, is simply any individual who speaks for the organization within the scope of his authority. *See* GAC Petition for Writ of Certioriari to the United States Court of Appeals for the Federal Circuit, No. 90-1800 (filed May 24, 1991) ("GAC Pet.")

at 15-16; *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 582 (Fed. Cir. 1990) (Plager, J., dissenting). There is no hint in the CDA that Congress intended for OFPP to develop a special definition of "contractor" for purposes of certification.[1]

Yet the panel found that the CDA implicitly authorized OFPP to state by way of regulation *precisely* which corporate officials could and could not certify claims. The panel relied heavily on this Court's reasoning in *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,843-44 (1984). In particular, the Federal Circuit drew on the following language: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." *Grumman Aerospace Corp.*, 927 F.2d at 578. The panel concluded that the regulation merely served "to fill the gap implicitly left by Congress respecting *who* may certify pursuant to that section." *Id.* (emphasis in original). The panel cited no statutory language or legislative history as grounds for finding such implicit legislative authority.[2]

To be sure, sometimes a legislative delegation is explicit and at other times it is implicit. In many cases, however, it is simply absent. Not every undefined word, concept or requirement in a statute leaves a gap calling for agency interpretation. As stated in *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, "The statute may be im-

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[1] Congress defined "contractor" in the CDA as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4).

[2] The panel's citation of 41 U.S.C. § 607(h) is discussed *infra* p. 7-8.

perfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." 474 U.S. 361, 374 (1986) (footnote omitted). Without some limit to implied legislative delegation, there would be no substance to the long-standing doctrine that "legislators are to make laws, not legislators." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607,686 (1980) (Rehnquist, J., concurring).

For example, the certification requirement of the CDA does not state what inquiry an individual must make before certifying a claim, although a reasonable statutory scheme might well contemplate that some inquiry should precede a good-faith certification. Congress could have imposed detailed requirements to address this policy issue, especially given the indications that certification was intended to trigger contractor liability. *Grumman Aerospace Corp.*, 927 F.2d at 597. But absent any indication that Congress intended such requirements, OFPP is not free to formulate them on the sole ground that they might further the legislation's goals. It might also have been advisable for Congress to have limited the individuals who could certify claims by requiring that they have overall corporate authority or special cognizant authority regarding the claim. Congress chose not to do so and did not indicate in any way that it left a gap for OFPP to fill.

A finding of implied delegation in this case cannot rest on the conclusion that "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not nec-

essarily expert in the area in which they choose to legislate. . . ." *American Petroleum Inst.*, 448 U.S. at 675. Who shall certify a claim's validity on behalf of a corporation is not a technical matter beyond the ken of Congress. In the Department of Defense Authorization Act of 1979, 10 U.S.C. § 2410, which was enacted contemporaneously with the CDA, Congress specified the qualifications of those who could certify particular claims against DOD, demonstrating beyond cavil that Congress is capable of doing so when it wishes. In light of this, the panel's statement that it is "not privy to all of the agency's reasons for its regulation and lack[s] the expertise developed by the agency in dealing with all aspects of certification," *Grumman Aerospace Corp.*, 927 F.2d at 579, rings especially hollow. The legislative power, not agency expertise, is the overriding principle that should have decided this case.

There are limits upon Congress's authority to delegate its legislative power expressly, including the requirement that Congress clearly delineate the contours of any delegation. *See, e.g., Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Mistretta v. United States*, 488 U.S. 361 (1989). The panel's finding of an implied delegation in this case either ignores this requirement or bootstraps it. The panel perceives some uncertainty regarding who may certify and then takes that uncertainty as legislative authority for OFPP to adopt a regulation out of whole cloth. This approach would justify all manner of regulation by emasculating the principle that the legislature may delegate but not abdicate. Abdication by

implication should not be read into the CDA at all, let alone so easily.

B. 41 U.S.C. § 607(h)

While its approval of the OFPP's regulation rests principally upon a finding that the regulation advances the legislative purpose, the panel did purport to find additional authorization in 41 U.S.C. § 607(h), which is entitled "Procedural guidelines":

> Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority). 41 U.S.C. § 607(h)(1988).

Quoting this section, the panel held that OFPP's claim-certification regulation constituted "guidelines with respect to criteria for the . . . functions . . . of the agency boards . . ." that "may be necessary or desirable to carry out the provisions of this chapter. . . ." *Grumman Aerospace Corp.*, 927 F.2d at 578. As such, the panel found the regulation to be "clearly within the congressionally delegated authority" of the OFPP. *Id.* This cannot be. The panel equates the internal "functions" of the agency boards with the claim-certification requirement Congress imposed *on contractors*. Read this broadly, section 607(h) would authorize OFPP to issue regulations affecting any contractors' rights or responsibilities that may come before the agency boards, so long as the regulation

is deemed "necessary or desirable" to carry out the provisions of the law. Section 607(h), entitled "Procedural guidelines" and concerned with the "establishment, functions and procedures" of the agency boards, is neither an explicit nor implicit legislative delegation to rewrite the CDA.

The long and short of the panel's opinion seems to be that agencies may develop rules out of thin air so long as the legislature has not explicitly forbidden it, even though no statutory language or legislative history suggests that Congress meant to delegate such authority. The result in this case is a certification requirement that bears no discernible resemblance to the CDA and produces outcomes that Congress could not have intended.

II. THE OFPP'S CLAIM-CERTIFICATION REGULATION PROVIDES NO GUIDANCE TO CONTRACTORS AND, AS INTERPRETED, VIOLATES THE CDA

The central irony of the panel's opinion is that it finds Congress's use of the word "contractor" in the CDA to be ambiguous, justifying a regulation, while it finds that OFPP's regulation "is unambiguous and must be applied literally." *Grumman Aerospace Corp.*, 927 F.2d at 578. The opposite is the case. There is no evidence that Congress, in considering the CDA, found the long-standing principles of corporate agency to be ambiguous or otherwise insufficient for purposes of the claim-certification requirement. On a regular basis, corporations and other business organizations file myriad forms, reports, claims, notices, etc. pursuant to laws that do not specify which persons are to submit, sign, or certify. The CDA is but another statute in which Congress did not modify traditional principles. *Cf. Dimension Fin. Corp.*, 474 U.S. at 373

("Nothing in the statutory language or the legislative history, therefore, indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage."). While the panel finds a gap in the certification requirement, it cites no evidence of one.

It is the OFPP's decision to close the nonexistent gap that has created all the doubt. 48 C.F.R. § 33.207(c)(2) provides as follows:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

The first prong of the regulation, specifying "[a] senior company official in charge at the contractor's plant or location involved" raises several questions. Who is a "senior" official? Is an "official" different from an employee or an officer? Of what must the official be "in charge" (the plant or location, the contract performance, performance of the disputed portion of the contract)? Which plant or location is "involved" (the one(s) where the contract was primarily performed, where the disputed portion of the contract was performed)?[3]

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[3] 10 U.S.C. § 2410, discussed *supra*, raises essentially these same issues. The point is that the CDA neither raises them nor indicates that they are to have any place in the statutory framework.

The second prong of the regulation, specifying "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs," is no clearer. One fundamental question raised by this case is whether the panel has created a "CEO-only" rule by denying certifying status to GAC's senior vice-president and treasurer on the ground that he had "overall responsibility *for just* the contractor's financial affairs." *Grumman Aerospace Corp.*, 927 F.2d at 580 (emphasis added). The panel disputes this characterization, but offers only the observation that "any such requirement would read the first description out of the regulation." *Id.* This suggests that the second prong may indeed be a "CEO-only" rule, but the panel did not clarify: "We hold only that GAC has failed to establish . . . either requirement of the regulation." *Id.* at 581. The question remains whether more than one officer can be said to have "overall responsibility for the conduct of the contractor's affairs." This unsettled issue, combined with the unresolved questions concerning the first alternative, leaves contractors unable to ascertain their certification options.

There should be no disagreement that certification of a claim in excess of $50,000 is a serious act. Taxpayer funds and corporate revenues are at stake; personal and corporate liability loom heavily. These incentives and disincentives will influence contractors to seek certification by only those employees who can certify in good faith, with knowledge concerning the supporting data and the applicable law. As this case demonstrates, however, the factual and legal issues surrounding claims may be complex, perhaps to the point that senior company officials of corporations

that have numerous Government contracts exceeding $50,000 will be unable to certify claims. On the other hand, those who are in a position to certify based upon their actual knowledge will not, in many cases, fit either alternative of the regulation as it has been interpreted. It is difficult to conceive that Congress, by not defining further the term "contractor," intended to place corporations in this predicament. As stated by Judge Plager in dissent, the statute "does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures." *Id.* at 583.

In *Triax Co. v. United States*, 20 Cl. Ct. 507 (1990), the court accepted the proposition that 48 C.F.R. § 33.207 is unambiguous, as held in *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir. 1989). The panel in this case affirmed the absence of ambiguity in the regulation. But other portions of the *Triax* opinion are more illuminating:

> Accepting defendant's reading of the regulation would render it ambiguous; businessmen and businesswomen of average or even extraordinary intelligence would be forced to play a guessing game when deciding who should certify a claim.
>
> * * * *
>
> Clearly the drafters of section 33.207(c)(2) meant for there to be *at least one person* within every contractor's organization who can certify claims on behalf of the contractor.
>
> * * * *

> Reducing claim certification to the level of circulating a petition around the contractor's office cannot be what Congress intended. Moreover, forcing contractors to resort to such mass certification would be tantamount to saying that the regulation is hopelessly ambiguous, yet the Federal Circuit has explicitly stated otherwise.

Triax Co., 20 Cl. Ct. at 512,513 (emphasis in original) (footnotes omitted). Given that the regulation must be unambiguous, the *Triax* court held, "The government cites no case where a certification executed by a corporate officer was held invalid, and the Court declines to make this the first such case." *Id.* at 511. The panel's holding in this case that the certification executed by a corporate officer is invalid compels at least one conclusion: the regulation is ambiguous.

Amicus AIA submits that Congress delegated no authority to OFPP to define who could certify claims on behalf of a contractor. If any delegation were inferable, that delegation did not authorize a regulation that so substantively affects the rights of parties and that, when interpreted in individual cases, leaves the certification requirement beyond the comprehension of contractors, the boards of contract appeals, and the courts. The panel's decision mistakes agency usurpation for legislative delegation, thereby distorting essential separation-of-powers principles.

CONCLUSION

For the foregoing reasons, AIA respectfully requests that the petition be granted.

Respectfully submitted,

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Dated: July 16, 1991